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No. 365

In the Supreme Court of the United States

OCTOBER TERM, 1929

HENRY ESCHER, ANCILLARY ADMINISTRATOR OF JAK. ROBERT SIGG-FEHR, DECEASED, GOTTFRIED RUDOLPH BAUMANN-KIENAST, AND EDMUND GAMS, PETITIONERS

v.

WALTER O. WOODS, AS TREASURER OF THE UNITED STATES, AND HOWARD SUTHERLAND, AS ALIEN PROPERTY CUSTODIAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

BRIEF FOR THE TREASURER OF THE UNITED STATES AND THE ALIEN PROPERTY CUSTODIAN IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Appeals of the District of Columbia (not yet reported) will be found at page 66 of the Record. The Supreme Court of the District of Columbia decided in favor of the petitioners without opinion. (R. 60.)

JURISDICTION

The decree sought to be reviewed was entered by the Court of Appeals of the District of Columbia on June 3, 1929. (R. 72.) The petition for writ of certiorari was filed August 31, 1929.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the Alien Property Custodian was constitutionally authorized to deduct, from the proceeds of property seized as enemy property but later held to belong to neutrals, $55,909.83 as expenses for administering the property for about 10 years, the amount deducted being two per cent of the amount of the property returned to the owners.

STATUTE INVOLVED

The pertinent statute involved is Section 24 of the Trading with the Enemy Act, approved March 4, 1923, c. 285, 42 Stat. 1511, 1516, which reads as follows:

> The Alien Property Custodian is authorized to pay all taxes (including special assessments), heretofore or hereafter lawfully assessed by any body politic against any money or other property held by him or by the Treasurer of the United States under this Act, and to pay the necessary expenses incurred by him or by any depositary for him in securing the possession, collection, or

control of any such money or other property, or in protecting or administering the same. Such taxes and expenses shall be paid out of the money or other property against which such taxes are assessed or in respect of which such expenses are incurred, or (if such money or other property is insufficient) out of any other money or property held for the same person, notwithstanding the fact that a claim may have been filed or suit instituted under this Act.

EXECUTIVE ORDERS

The Executive Order issued by the President on February 26, 1918 (No. 2813), provided in part that—

(a) The Alien Property Custodian may appoint and clothe with necessary power and authority such agents, bailees, and attorneys in fact as he may find to be necessary or proper to carry out the provisions of the "Trading with the Enemy Act" and the Executive orders, rules, and regulations heretofore, hereby, or hereafter made, and prescribe the duties and fix the compensation of such agents, bailees, and attorneys in fact; and any depositary designated by the Alien Property Custodian may be appointed as such agent, bailee or attorney in fact. And the Alien Property Custodian may require bonds of such agents, bailees and attorneys in fact and fix the penalty and conditions thereof.

(b) The Alien Property Custodian may pay all reasonable and proper expenses

> which may be incurred in or about securing possession or control of money or other property and in or about collecting dividends, interest, and other income therefrom, and in otherwise protecting and administering the same. So far as may be, all such expenses shall be paid out of, and in any event recorded as a charge against, the estate to which such money or other property belongs.
>
> * * * * *

The Executive Order of July 16, 1918 (No. 2916), specifically authorized and empowered the Alien Property Custodian—

> to determine and pay all reasonable and proper expenses incurred in or about or with respect of the exercise of any of the powers and authority vested in the Alien Property Custodian or any depositary for him, including expenses that may be incurred in or about securing possession, custody or control of any such property, and including also taxes and other charges heretofore or hereafter lawfully assessed upon or against such property by any body politic * * *.

STATEMENT

The suit out of which the instant controversy arises was filed in the Supreme Court of the District of Columbia on December 8, 1921. (R. 1.) After protracted proceedings it was adjudged that the plaintiffs were citizens of Switzerland and residents

of Zurich and as such were entitled to recover proceeds of the sale of certain shares of stock and bonds (together with accrued dividends and earnings on the proceeds) which were seized by the Alien Property Custodian during the war as property of a German corporation. The decree, entered January 19, 1928, ordered the Alien Property Custodian and the Treasurer of the United States to deliver the property to the plaintiffs (R. 47)—

> after deducting therefrom any expenses or disbursements in respect of or on account of said property or any part thereof, duly made under the authority of the trading with the enemy act and amendments thereto.

No objection to this decree was made by either party, but after a payment had been made in which the Alien Property Custodian deducted $55,909.83 as administrative expenses, the plaintiffs filed a petition for a rule directing the defendants to show cause why they should not also pay this sum to the plaintiffs. (R. 50.) The defendants filed a motion to discharge the rule to show cause, and in their answer alleged that the Custodian (R. 58)—

> deducted from the money determined to be the money of the plaintiffs herein the sum of $55,909.83 as administrative expenses, said sum having been paid by the Alien Property Custodian into a fund maintained by him, out of which the expenses incurred in administering money and other property seized by the Alien Property Custodian are paid.

The plaintiffs then moved to strike this answer from the record on the ground that it was insufficient to justify the admitted refusal to pay the plaintiffs the sum in question and certain other sums not involved in the instant petition. (R. 59.) The Supreme Court of the District, after argument, entered an order adjudging the retention of the same "unlawful and without right" and ordering the defendants to pay the same to the plaintiffs. (R. 60.) On appeal, the Court of Appeals of the District of Columbia reversed this order and remanded the cause for further proceedings not inconsistent with its opinion. (R. 72.)

ARGUMENT

I

THE ALIEN PROPERTY CUSTODIAN WAS CONSTITUTIONALLY AUTHORIZED TO DEDUCT FROM PROPERTY SEIZED BY HIM A FAIR CHARGE FOR ADMINISTERING IT

On page 5 of their brief in the Court of Appeals these petitioners said:

> We have not contested and do not here contest the right of the Custodian to deduct from plaintiffs' money all disbursements or expenditures necessarily made for the purpose of protecting or administering the money and property of the appellees, and which are directly attributable to such money or property.

They now contend that "as a question of statute and constitutional right" it was improper to make a deduction of "one cent more than the actual expense of protecting or administering such property" and state that the utmost that can be charged against such property "is *actual cost* of administration". (Brief of petitioners, pp. 14, 25.)

The power of Congress to authorize the seizure of property *supposed to belong to an enemy,* even before an adjudication that it was enemy property, has been upheld by this Court. *Central Trust Co.* v. *Garvan,* 254 U. S. 554; *Stoehr* v. *Wallace,* 255 U. S. 239. The latter case held that the Trading with the Enemy Act, which provides for such seizure, does not violate the Fifth Amendment, but is sanctioned by Article 1, Section 8, Clause 11, of the Constitution, which empowers Congress—

> To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water.

This Court has also recognized that under the Act of November 4, 1918, c. 201, 40 Stat. 1020, all property seized should be administered by the Alien Property Custodian and that by the Act of March 28, 1918, c. 28, 40 Stat. 459 (providing that the Custodian should be "vested with all of the powers of a common-law trustee in respect of all property"), he is given the power to "manage the same as though he were absolute owner." *Central Trust Co.* v. *Garvan,* 254 U. S. at page 569, *supra.*

Owing to the magnitude of the task it was, of course, impossible for the President or the Alien Property Custodian (to whom he delegated his authority) to handle alone the administration of the trusts thus imposed upon him; and Congress authorized the President to employ clerks, attorneys, accountants and other necessary employees for administration of the Act. (Section 6 of Trading with the Enemy Act, c. 106, 40 Stat. 411, 415.) The power vested in the President by this section was delegated to the Alien Property Custodian by the Executive Order of October 29, 1917. An Executive Order of February 26, 1918, issued by the President, authorized the Alien Property Custodian to prescribe the duties and compensation of agents, and also authorized him to pay proper expenses, including the expense of "administering" the property, and, as far as possible, to pay such expenses out of the estate administered. An Executive Order of July 16, 1918, authorized the Custodian to "*determine* and pay out all reasonable and proper expenses incurred in or about or with respect of the exercise of any powers vested" in him. (Italics ours.)

This construction of the statute by the President, who was charged with the duty of enforcing it, should not be overruled unless such construction is clearly erroneous. *United States* v. *Moore,* 95 U. S. 760; *Brown* v. *United States,* 113 U. S. 568; *United States* v. *Johnston,* 124 U. S. 236; *Pennoyer* v. *McConnaughy,* 140 U. S. 1; *Robertson* v. *Downing,* 127 U. S. 607, 613.

The practice of deducting from the several trusts administered by the Custodian certain percentages which aggregate an amount sufficient to cover his administrative expenses has been in force since the promulgation of the Executive Order of February 26, 1918, *supra.* This practice was known to the Congress prior to the enactment of the Act of March 4, 1923, *supra.* Therefore the legislative authority given the Custodian by the Act of March 4, 1923, "to pay the necessary expenses incurred by him or by any depositary for him in securing the possession, collection, or control of any such money or other property, or in protecting or administering the same," would seem to be a statutory confirmation of the practice theretofore existing and an implied endorsement by Congress of the existing practice.

Congress also approved this practice by the Act of May 16, 1928, c. 580, 45 Stat. 573, 574, which provided that all expenses of the Office of the Alien Property Custodian, including his own compensation, should be paid from "interest and collections on trust funds and other properties under the control of such Custodian."

It is, of course, a general principle that a trust estate must bear the expenses of its administration. *Trustees* v. *Greenough,* 105 U. S. 527, 532. In this connection it should be borne in mind that the Act of March 28, 1918, c. 28, 40 Stat. 459, 460, provided, that the Custodian should be "vested with all of the powers of a common-law trustee".

We consequently submit that it was proper for the Custodian to deduct from the funds in question the expenses of administering the fund.

The instant petition states (p. 6):

> The decision of the Court of Appeals by implication conflicts with the decision of the Circuit Court of Appeals for the ninth Circuit in *Vowinckel* v. *Sutherland,* 24 Fed. (2nd) 196 and decisions of this Court in *Central Union Trust Company* v. *Garvan,* 254 U. S. 554; *Stoehr* v. *Wallace,* 255 U. S. 239; *Henkles* v. *Sutherland,* 271 U. S. 298; and *Trustees* v. *Greenough,* 105 U. S. 527.

We submit that these Supreme Court cases, in so far as they bear upon the subject, sustain, rather than conflict with, the decision of the Court of Appeals in the instant case. In *Henkels* v. *Sutherland,* 271 U. S. 298, this Court held that an American citizen whose property had been wrongfully seized by the Alien Property Custodian was entitled to recover the same, together with the accrued income therefrom, "*after deducting proper charges and expenses.*" (Italics ours.) See also *Haycraft* v. *United States,* 22 Wall. 81, 93–94.

In *Vowinckel* v. *Sutherland,* the Circuit Court of Appeals for the Ninth Circuit held that it was improper for the Alien Property Custodian to deduct certain traveling expenses and similar expenses incurred by the Department of Justice in resisting an appeal in a suit brought against the Custodian by a successful claimant. The holding of the

case is that these expenses "were not incurred in protecting or administering" the property. 24 F. (2d) 196, 198. The decision in that case does not conflict with the decision of the Court of Appeals in the instant case, which upheld an entirely different sort of deduction as an expense of administration.

The only question remaining to be considered is whether the deduction does represent a proper expense of administration.

II

THE DEDUCTION OF $55,909.83 IS A PROPER CHARGE FOR EXPENSES OF ADMINISTERING AN ESTATE FOR TEN YEARS, WHERE THE PRINCIPAL AMOUNTED TO OVER $3,000,000 AND THE ACCUMULATED EARNINGS THEREON AGGREGATED OVER $1,000,000.

The real contention of the petitioners seems to be that the Custodian can make no deduction for administrative expenses unless he can show to the cent the amount which the administration of this particular trust actually involved.

If this were so, it would be impossible, as a practical matter, for the Custodian to collect any considerable proportion of the expenses of the administration of the trusts in his charge. The Custodian, of course, was obliged to maintain a large organization to administer the trusts. The same persons undoubtedly attended in the course of each day to the various details of many different trusts, and it was not feasible to apportion any aliquot part

of the salaries of particular persons or other general expenses among the numerous estates handled. If the contention of the petitioners were sound, the provisions for payment of administrative expenses would be futile. The determination of the amount of administrative expense to be charged each estate, delegated by the President to the Custodian, should be final, unless clearly unreasonable. Must each successful claimant be given the right to inspect all of the books of account of the Custodian over a period of ten years, to cross-examine Custodians, past and present, as to their accounts, and to require the court to apportion expenses between the different trusts? We submit that all any successful claimant of seized property can require is that the amount deducted should be a reasonable charge for administering his property. The petitioners, of course, had an opportunity in the courts below to contend that the charge was an unreasonable one for the administration of their property, but they did not make any such contention in the courts below and do not now so contend.

We submit that the deduction made is so small in proportion to the amount of the funds administered that there is no possible ground for contending that it was unreasonable.

The principal of the trust estate originally amounted to over $3,000,000. ($489,000 par value of obligations of the United States and stock worth

over $2,700,000 were seized. R. 53.) The $55,-909.83 deducted is less than two per cent of this amount, and is about five per cent of the income, which averaged over $100,000 annually. The administration of this fund involved arranging for and considering an appraisal of the stock seized, arranging for a sale of it and re-investing of the proceeds, collecting dividends from the stock and the bonds and investing the income regularly, besides other detail incidental to the care of the property. It is obvious that this administration—extending over a period of ten years—must have required a large amount of routine work, as well as oversight requiring discretion and judgment. The percentage charged is much less than would ordinarily be allowed a private trustee for similar services in administering a trust estate of this size.

CONCLUSION

Although, as we have stated, the practice of dededucting for administrative expenses certain percentages of funds wrongfully seized has been in effect for years, and there has been much litigation under the Trading with the Enemy Act, we are aware of no case in which the objection raised in the instant petition has ever been litigated before, and we are informed that it is not raised in any other case which is pending at the present time. The decision of the Court of Appeals is not in conflict with the decision of any other court, and the case pre-

sents no question of general importance. We believe that no substantial ground for the issuance of a writ of certiorari by this Court has been shown and that the petition should be denied.

Respectfully submitted.

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